

FILED

APR 18 2018

Clerk, U S District Court
District Of Montana
Billings

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
GREAT FALLS DIVISION**

LAVERNE J. VONDAL,

Petitioner,

vs.

LEROY KIRKEGARD, ATTORNEY
GENERAL OF THE STATE OF
MONTANA,

Respondents.

CV-15-41-GF-BMM

ORDER

Petitioner Laverne Vondal (Vondal) has filed a petition seeking a writ of habeas corpus under 28 U.S.C. § 2254. (Doc. 22). Vondal is a state prisoner proceeding *pro se*.

Vondal was convicted of Operating an Unlawful Clandestine Laboratory and two counts of Criminal Endangerment in Montana's Fifteenth Judicial District Court, Sheridan County. (See Doc. 28-28). The state court sentenced Vondal on November 15, 2004, to 40 years in prison, with 25 years suspended for operating the unlawful laboratory. The state court sentenced Vondal to 10 years in prison on each of the criminal endangerment convictions. *Id.* All three sentences were to run concurrently. *Id.*

Vondal filed a federal habeas petition in 2011 seeking relief from his 2004 conviction in state court. The petition was dismissed with prejudice as time-barred and procedurally defaulted. *Vondal v. Frink*, CV 11-42-GF-SEH (Order, Sept. 14, 2011).

Vondal filed the present petition for writ of habeas corpus on May 7, 2015. (Doc. 1). Vondal again seeks relief from his 2004 conviction. Vondal alleges that he is entitled to habeas relief for the following reasons: 1) law enforcement conducted an illegal search and seizure in violation of the Fourth Amendment to the United States Constitution; 2) trial counsel provided ineffective assistance of counsel by failing to file a suppression motion, by failing to adequately investigate his case, by failing to file a direct appeal, and by laboring under a conflict of interest; 3) the trial judge was biased and engaged in misconduct; and 4) he was denied a fair trial in violation of his right to due process. (Doc. 22 at 4-9). Vondal seeks immediate release from custody and expungement of his criminal record.

Magistrate Judge John Johnston entered an Order to show cause in this matter on December 12, 2017. (Doc. 33). Judge Johnston informed Vondal that the claims asserted in his Amended Petition appeared to be procedurally defaulted for purposes of federal habeas review. (Doc. 33 at 7). Judge Johnston explained to Vondal why his claims were procedurally defaulted. (Doc. 33 at 7-8). Judge

Johnston ordered Vondal to show cause why his Amended Petition should not be dismissed with prejudice as procedurally defaulted. (Doc. 33 at 9). Vondal filed a response to Judge Johnston's Order to show cause on January 24, 2018. (Doc. 34).

Judge Johnston entered Findings and Recommendations in this matter on February 28, 2018. (Doc. 35). Judge Johnston recommended that Vondal's Amended Petition be dismissed with prejudice because Vondal had failed to demonstrate adequate cause to excuse the procedural default. (Doc. 35 at 2-6). Vondal filed an objection to Judge Johnston's Findings and Recommendations. (Doc. 38). The Court reviews *de novo* findings and recommendations to which objections are made. 28 U.S.C. § 636(b)(1). The Court has reviewed Judge Johnston's Findings and Recommendations *de novo*. The Court finds no error in Judge Johnston's Findings and Recommendations, and adopts them in full.

A federal habeas court generally cannot hear claims by a state prisoner that have never been fairly presented in state court. *O'Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999). Vondal has failed to present any of the claims in his Amended Petition to the Montana Supreme Court. None of Vondal's claims can be presented to the Montana Supreme Court now as they are time-barred. Mont. Code Ann. § 46-21-102(1), (2). Given that there no longer exists a state procedural avenue for Vondal to raise his claims in state court, all of the claims are procedurally

defaulted. *Smith v. Baldwin*, 510 F.3d 1127, 1139 (9th Cir. 2007). Vondal has failed to show adequate cause to excuse the procedural default.

Accordingly, IT IS ORDERED:

1. Vondal's Amended Petition (Doc. 22) is DISMISSED with prejudice as procedurally defaulted.
2. A certificate of appealability is DENIED. Vondal has made no substantial showing that he was deprived of a constitutional right. Reasonable jurists would agree that Vondal's claims are procedurally defaulted and that Vodal has failed to establish cause to excuse the default. No basis exists to encourage further proceedings in this case.
3. The Clerk is directed to enter judgment accordingly.

DATED this 18th day of April, 2018.


SUSAN P. WATTERS
U.S. District Court Judge